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In the Supreme Court of the United States

OCTOBER TERM 1962

No. 330

CITIZENS UTILITIES COMPANY OF CALIFORNIA, a corporation,
Appellant,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO, AND CITY OF NORTH SACRAMENTO, a municipal corporation, (Real Party in Interest),
Appellees.

Appeal From the Judgment of the District Court of Appeal, State of California, in and for the Third Appellate District.

Statement as to Jurisdiction

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Appellees.

Appeal From the Judgment of the District Court of Appeal, State of California, in and for the Third Appellate District.

Statement as to Jurisdiction

Pursuant to United States Supreme Court Rules 13(2) and 15, Appellant files its statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the judgment of the District Court of Appeal, State of California, in and for the Third Appellate District in question and should exercise such jurisdiction in this case.

OPINION BELOW

The District Court of Appeal delivered no written opinion or discussion of the case other than to decree that Appellant's Petition for Review and or Prohibition be denied. A true and exact copy of said decree marked Appendix "A" is attached hereto.

JURISDICTION

This appeal is from a final judgment made and entered by the District Court of Appeal, State of California, in and for the Third Appellate District, upon Appellant's Petition for a Writ of Review and/or Prohibition directing the Superior Court of the State of California in and for the County of Sacramento to prohibit Appellee, City of North Sacramento, from taking possession of Appellant's property in an eminent domain proceeding until payment of full just compensation was made to Appellant or reasonable security therefor was provided Appellant by said City in order that Appellant's rights under Section 1 of the 14th Amendment to the United States Constitution might be duly protected.

The final judgment appealed from was made and entered on April 18, 1962. Notice of Appeal from said judgment was filed in the District Court of Appeal for the State of California in and for the Third Appellate District on the 18th day of May, 1962.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 U.S.C. Sections 1257(2) and 2101(e).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Ward v. Kransky (1922), 42 S.Ct. 529; 259 U.S. 503; 66 L.Ed. 1033;

Fiske v. State of Kansas (1927), 47 S.Ct. 655; 274 U.S. 380; 71 L.Ed 1108;

Standard Oil Company of California v. Johnson (1941), 62 S.Ct. 1168; 316 U.S. 481; 86 L.Ed. 1611.

The statute of the State of California that is involved in this case is Section 1419 of the California Public Utilities Code which provides as follows:

> "The commission shall thereupon transmit to the court its finding, certified under the seal of the commission, fixing the extent to which the just compensation theretofore fixed by the commission shall be increased or decreased. The court shall thereupon modify its judgment so as to conform with the finding of the commission. The judgment of the court, as thus modified, insofar as it refers to the just compensation to be paid for the lands, property, and rights, shall be final and shall not be subject to modification, alteration, reversal, or review by any court. The filing of either or both the petitions specified in Section 1417 shall not act as a stay of the judgment in condemnation, but upon the payment of the just compensation fixed in the original judgment of condemnation the plaintiff in the action shall be entitled to immediate possession of the lands, property, and rights."

Although Appellant attacked said section in said District Court of Appeal as depriving Appellant of due process under Section 1 of the 14th Amendment to the United States Constitution under the facts of the instant case, said Court determined that said section was valid and refused to decree the relief necessary to protect Appellant from infringement of its rights under the said Constitution.

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QUESTIONS PRESENTED

Division 1, Part 1, Chapter 8 of the California Public Utilities Code establishes procedure whereby defined "political subdivisions" of the State desiring to acquire the lands, property and rights of any character whatsoever of any public utility under eminent domain may petition the California Public Utilities Commission to fix the just compensation which shall be paid by such political subdivision therefor. When the proceeding is submitted, the Commission is required to make and file a written finding fixing such just compensation as of the day on which the petition was filed with it. Within twenty days thereafter the property owner may stipulate to accept the sum fixed by the Commission; in the event the owner does not, the political subdivision may commence an action in a court of competent jurisdiction to condemn the property. If the court determines that the political subdivision has the right to take the properties sought, it must enter a judgment in favor of the complainant in the action, fixing as the just compensation which shall be paid for the taking of such properties the just compensation fixed by the Commission. The judgment of the court must include a provision in substance, that it is subject to modification by reason of such increase or decrease in the just compensation to be paid as may thereafter be certified to the court by the Commission.

The procedure specified permits the property owner to file a petition with the Commission subsequent to the entry of judgment in the Court action praying that the just compensation theretofore fixed by the Commission be increased by reason of expenditures made by the owner subsequent to the date of the filing of the original petition, for the purpose of preserving or improving the properties sought or by reason of other acts and occurrences subsequent to that

date. The political subdivision may petition the Commission to make a finding decreasing the just compensation by reason of depreciation or deterioration or other acts and occurrences subsequent to the date of the filing of the original petition. The finding of the Commission fixing the extent to which the 'just compensation' theretofore fixed should be modified is transmitted to the Court which must modify its judgment so as to conform to the ultimate Commission finding.

Section 1419 of the Code as stated before provides that the filing of either or both of such petitions after the entry of the judgment in condemnation shall not stay the same but "upon the payment of the just compensation fixed in the original judgment of condemnation the plaintiff in the action shall be entitled to *immediate possession of the lands, property and rights*". (Emphasis added). As such, the section patently dispenses with a requirement that in advance of the taking of such property the political subdivision, as condemnor, need deposit a sum sufficient to secure and insure that the utility owner will receive prompt payment of the full amount of just compensation when the same is finally assessed.*

Under the facts of the instant case, the principal questions are these:

1. Did the District Court of Appeal err in holding that the City of North Sacramento, a municipal corporation, as condemnor, may take possession of Appellant's public utility water system at this time upon payment of an amount determined by the California Public Utilities Commission to constitute just compensation therefor as of December 3,

* The provisions of Division 1, Part 1, Chapter 8 of the California Public Utilities Code from which the foregoing introductory statement is drawn are set forth in Appendix B hereafter under the heading "Statutes Involved".

1956 without providing any security for the payment of additional compensation to be assessed by said Commission for said property in proceedings pending before it by reason of improvements made by Appellant to said water system and other acts and occurrences since December 3, 1956, which additional compensation ranges from an admitted minimum of approximately $200,000 to a maximum of approximately $600,000?

2. Whether Section 1419 of the California Public Utilities Code deprives Appellant public utility owner of its property without due process of law in violation of Section 1 of the 14th Amendment to the United States Constitution in providing that a condemnor of public utility property shall be entitled to immediate possession of the same solely upon payment of the amount of just compensation assessed by the California Public Utilities Commission as of the date of commencement of valuation proceedings before it, regardless of the number of years between the date of the commencement of the action and actual possession (5½ years here) and the consequences on fair value of intervening events.

STATEMENT OF THE CASE

On December 3, 1956, the City of North Sacramento (hereinafter designated "City") commenced the initial step in bifurcated eminent domain proceedings before the Superior Court of the State of California and the California Public Utilities Commission by filing a petition with that Commission (Application No. 38629) in accordance with procedure prescribed in Division 1, Part 1, Chapter 8 of the Public Utilities Code (Sections 1401-1421). In its petition the City prayed that the Commission fix the just compensation which should be paid by it for described lands, property and rights comprising the public utility water

system owned and operated by Appellant in Sacramento County, California within and adjacent to said City's boundaries and known as Appellant's "North Sacramento District" water system.

On *September 15, 1958*, that Commission filed written findings in its *Decision No. 57344* fixing the just compensation to be paid by said City for said water system, *as of December 3, 1956*, at $2,200,000, together with severance damages of $6000, a total award of $2,206,000.

On *November 6, 1958*, the City filed Complaint in Eminent Domain in the Superior Court in and for the County of Sacramento (being proceeding number 116092 in the records of said Court), praying for a judgment condemning Appellant's water system and that the Court fix as the just compensation to be paid therefor the amount fixed by the Public Utilities Commission in its Proceeding No. 38629.

On *November 5, 1959*, following trial, Interlocutory Judgment of Condemnation was entered in such action wherein the Court decreed the condemnation of Appellant's water system upon the payment by the City of $2,206,000 as aforesaid, subject to modification by reason of such increase or decrease in compensation as might thereafter be certified to the Court by the Public Utilities Commission as provided in Sections 1416 to 1419 inclusive of the Public Utilities Code. (See Appendix "C")

On *November 25, 1959*, pursuant to Section 1417 of the Public Utilities Code, Appellant petitioned the Public Utilities Commission to make a supplemental finding *increasing* the just compensation theretofore fixed by its Decision No. 57344, as the result of expenditures made by Appellant subsequent to December 3, 1956 for the purpose of preserving and improving said water system and by reason of "other acts and occurrences", including increases in reproduction value since the December 3, 1956 valuation date.

On *December 2, 1959*, the City filed a corresponding petition with the Commission, praying that the just compensation fixed by it in its Decision No. 57344 be *decreased* by reason of loss or destruction of the properties sought or by reason of "other acts and occurrences" subsequent to December 3, 1956.

Appellant and the City stipulated that the Commission's supplementary finding be made as of such time as the City might take possession of said water system.

On *December 16, 1959*, pursuant to said stipulation the Commission continued the supplementary proceedings indefinitely to await the time when said City might take over such possession.

Appellant timely appealed from said Interlocutory Judgment of Condemnation to the District Court of Appeal in and for the Third Appellate District. Said Court affirmed said Interlocutory Judgment of Condemnation, on May 24, 1961. On *July 19, 1961*, the California Supreme Court denied Appellant's Petition for Hearing of said Decision, by divided vote.

On *August 4, 1961*, upon application by said City the Superior Court in and for the County of Sacramento extended the time for payment of said Interlocutory Judgment of Condemnation for one year from the date of the finality of said Interlocutory Judgment in accordance with its authority under Section 1251 of the California Code of Civil Procedure. Said application was based upon the Affidavit of Homer Jack, City Manager of North Sacramento, which affidavit declared in part that on August 6, 1956 the voters of said City had authorized it to incur a bonded indebtedness in the sum of $2,500,000 for the acquisition of a municipal water system, and that such bonds had to be issued and sold by the City in order to finance acquisition

of Appellant's water system, for otherwise the City *had not sufficient monies to pay the sum assessed in the Interlocutory Judgment.*

The City thereafter took no formal action toward acquiring Appellant's said water system until *March 29, 1962,* when the City Council of North Sacramento adopted City Resolutions Nos. 2650 and 2651 providing a) for the issuance of $2,500,000 in water revenue bonds pursuant to the authority obtained in 1956, b) authorizing and directing sale of said bonds and c) setting *April 11, 1962* as the date for receiving bids from persons interested in purchasing the same at par plus a minimum premium of $165,000 to be used in addition for the purpose of acquiring Appellant's water system.

On *March 30, 1962,* following receipt of advice of the action taken by the City in adopting such resolutions, and bearing in mind statements made by the City's special counsel after the Interlocutory Judgment became final but prior to said formal action by said City Council (which were later confirmed by statements in the introduction to the "Official Statement of the City of North Sacramento" issued by the City to interest bond bidders in said prospective sale), to the effect that the City felt that it had the right to take over Appellant's water sysem by paying Appellant the sum of $2,206,000 only and without regard to the supplementary valuation proceedings pending before the Public Utilities Commission, Appellant filed its Notice of Motion in said Superior Court. In said motion Appellant asked the Court to exercise its authority under California Code of Civil Procedure, Section 681(a)* to "Stay Execution of Judgment of Condemnation until Payment of Just Compensation is Made or Reasonable Security Therefor is

* Section 681(a): "The court, or the judge thereof, may stay the execution of *any judgment or order; . . .*" (Emphasis added.)

provided by Plaintiff Condemnor" in order that Appellant's rights under Sections 13 and 14 of Article I of the California Constitution and Section 1 of the 14th Amendment to the Federal Constitution might be protected. In support of this motion Appellant presented the Declaration of its Vice President and General Manager of water operations attesting to the fact that during the period subsequent to December 3, 1956 through January 1, 1962 Appellant had made net additions and betterments to its North Sacramento District system for the purpose of preserving or improving the properties comprising the same of the fair value of not less than $539,471 and that by reason of other acts and occurrences during said period,* the water system evaluated by the Public Utilities Commission as of December 3, 1956 had appreciated in value by not less than $83,633 after due allowance for retirements and for maximum depreciation thereof during said period and that as of January 1, 1962, the just compensation reasonably due Appellant for its said water system was not less than the sum of $2,829,104.00.

At no time during the course of its opposition to Appellant's motion did the City introduce evidence purporting to conflict with the sworn declaration of Appellant's Vice President regarding the increases in value in Appellant's water system aforementioned. In his original legal memorandum and at oral argument special counsel for the City represented only that the City had "estimated" the supplemental award of the Public Utilities Commission at "about $185,000". The City's entire factual presentation consisted of data set forth in its "Official Statement" to bond bidders referred to before and in a letter from the Public Utilities

* A substantial increase in the cost of labor, materials and equipment.

Commission dated August 25, 1961 relative to the total net increase in Appellant's utility plant to June 30, 1961 which declared that during the period December 4, 1956 to June 30, 1961 the total net increase in Appellant's utility plant computed at cost to Appellant was approximately $448,000. The City's presentation further revealed that $224,000 of the anticipated proceeds from its bond sale was necessarily earmarked for purchase of supplies and equipment, the payment of engineering, legal financing and "miscellaneous" costs and for initial deposit to a Bond Reserve and could not be used to compensate Appellant for its property.

The City did not at any time agree to pay or deposit *any* sums in excess of $2,206,000 as a condition to acquiring physical possession of said system.

Upon completion of oral argument and without further consideration the Court denied Appellant's motion for full payment or deposit of security therefor.

On *April 9, 1962*, Appellant filed its "Petition for Writ of Review and/or Prohibition" with the California District Court of Appeal in and for the Third Appellate District, setting forth the facts and contentions herein enumerated and praying that that Court issue its Writ of Review to said Superior Court that a review of the latter court's denial of Appellant's motion could be had and that such Court issue its order requiring said Superior Court and the City of North Sacramento to desist from proceedings directed to result in the acquisition of Appellant's water system pending determination of the validity of said order of denial. On *April 18, 1962*, the Third Appellate District Court denied Appellant's petition without opinion.

On *April 28, 1962* Appellant filed a Petition for a Hearing by the California Supreme Court of the decision of said District Court of Appeal, contending therein, as here, that

said City cannot constitutionally take over possession of Appellant's water system under the circumstances without first providing Appellant with reasonable security to insure prompt payment of the full measure of just compensation due it, (i.e. the original award of just compensation together with the increase therein which the Court reasonably anticipates under the evidence will be fixed by the California Public Utilities Commission in the aforementioned supplementary proceedings) and that under the evidence any sum so fixed cannot reasonably be less than the sum of $600,000. Appellant moreover contended that acquisition of its said water system by the City in conformance with the procedure set forth in Section 1419 of the California Public Utilities Code (i.e. without depositing reasonable security for payment of such sum in advance of such taking) deprived Appellant of due process guaranteed to it by Section 1 of the 14th Amendment to the United States Constitution. On *May 16, 1962* that Court denied Appellant's Petition for Hearing, without opinion. Appellant promptly filed its Notice of Appeal herein on *May 18, 1962*.

On *May 17, 1962* the City sold its aforementioned bonds and deposited the sum of $2,206,000 with the Clerk of the aforesaid Superior Court for the account of Appellant, and thereupon obtained an ex parte Final Order of Condemnation from that Court transferring title to said water system to the City and authorizing it to take over possession. Thereafter on said date the City made demand upon Appellant to surrender possession of its water system.

On *May 18, 1962* Appellant applied to the aforementioned District Court of Appeal to stay said Final Order of Condemnation and all further proceedings in the matter until Appellant could prepare and properly present to this Hon-

orable Court its application for a Supersedeas under Rule 18 of its Revised Rules so that Appellant would not be required to relinquish its property without first having its constitutional rights in the premises fully determined. The District Court of Appeal denied said request that same day without opinion.

Appellant attempted to have the Superior Court in and for the County of Sacramento stay its Final Order of Condemnation for a matter of days until Appellant could make application to this Court for a Supersedeas, as aforesaid, but that request was denied on *May 25, 1962*. On said date said Superior Court granted the City's request for a Writ of Assistance or Possession whereunder said City might be placed into possession of Appellant's water system through the auspices of said Court. On said date and *prior* to the formal rendition of the order granting said Writ, armed police officers of the City and others acting on its behalf took over and occupied physical possession of said water system and ousted Appellant therefrom.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The California Courts have authorized the City, acting as a condemnor of public utility property, to take over physical possession thereof in advance of fully compensating Appellant therefor *without even so much as depositing a single penny to insure that Appellant will receive prompt payment of the balance of full just compensation when the same is ultimately assessed.* The California Courts have countenanced such action because of the language of Section 1419 of the Public Utilities Code which purports to entitle the condemnor to immediate possession of property by paying only an amount *which the statute acknowledges does not constitute full just compensation.*

Under the circumstances of the case at bar, entry of the City under said statute results in Appellant being deprived of security for payment of just compensation amounting to a substantial sum.

While the authorities hold that due process under the Federal Constitution does not require that an owner of property being condemned receive compensation in advance of relinquishing physical possession thereof to the condemnor, the cases are legion and uniform to the effect that the property owner is entitled *to a reasonable, certain and adequate assurance if he surrenders possession in advance, that payment of just compensation will not be unreasonably delayed after the amount of the same has been assessed.* (*Dohany v. Rogers* (1930) 50 S.Ct. 299; 281 U.S. 362; 74 L.Ed. 904; *Hays v. Seattle* (1920), 40 S.Ct. 125; 251 U.S. 233; 64 L.Ed. 243; *Crozier v. Fried. Krupp Aktiengesellschaft* (1911), 32 S.Ct. 488; 224 U.S. 290; 56 L.Ed. 771; *Sweet v. Rechel* (1895), 16 S.Ct. 43; 159 U.S. 380; 40 L.Ed. 138; *Cherokee Nation v. Southern Kansas R. Co.* (1889), 10 S.Ct. 965; 135 U.S. 641; 34 L.Ed. 295.)

The evidence before the lower court indicates that the City *must* look to the proceeds from its bond sale as the *only* source from which to pay the amount of just compensation determined to be due Appellant. Such evidence demonstrates that the City does not otherwise have the financial wherewithal to pay *any significant portion of said amount.* It also shows that *in any event* the proceeds from said bond sale are not sufficient, even if deposited in their entirety for Appellant's benefit, to secure prompt payment of the ultimate award of just compensation which shall be found due. Under such circumstances Appellant will be relegated to the remedies and the uncertainties and expenses attendant to becoming a municipal creditor.

California property held by a city in trust for a public use is exempt from seizure and sale upon execution (*Wood v. San Francisco* (1894), 4 Cal. 190, 194; *Oakland v. Oakland Waterfront Co.* (1897), 118 Cal. 160, 195-6), as is property held by a city for the purpose of exercising proprietory functions authorized by the California Constitution (*C. J. Kubach Co. v. City of Long Beach* (1935), 8 Cal. App. 2d 567, 577-8). Moreover, Section 690.16 of the Code of Civil Procedure specifically exempts from execution or attachment "the lots and grounds thereunder belonging and appertaining, owned or held by * * * an incorporated city * * *". Apart from these exemptions, the City has failed to evidence that it holds any other property which would be readily available to satisfy Appellant's claim for payment of full just compensation.

Article VII of Chapter 1, Division 1 of Title 5 of the California Government Code* provides the method whereby a

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* "*Sec. 50170. Filing.*

The county clerk shall file a list of all existing final judgments against a local agency of record in his office with the auditor and legislative body at least fifteen days before a tax levy is made." ("Local agency" includes a "city". Sec. 50001.)

"*Sec. 50171. Audit; certification; tax levy.*

The auditor shall audit the judgments and certify the amount of the judgments to the treasurer within five days after the list is filed with him. The legislative body shall include in the tax levy for the next fiscal year a rate sufficient to pay the judgments.

"*Sec. 50172. Tax levy; effect of failure to include judgment.*

Failure to include the amount of any existing final judgment in the tax levy for the year does not invalidate the tax levy, but the amount shall be included in the next tax levy.

"*Sec. 50173. Percentage payments; tax levy.*

In lieu of levying a tax rate for the payment of all the judgments in the next fiscal year, the legislative body may provide for their payment by including in the tax levy for the next fiscal year at least 10 percent of the total amount of the judgments. The same percentage shall be levied each successive year until the whole is paid.

"*Sec. 50174. Payment or percentage payments.*

The treasurer of the local agency shall pay the judgments. If the

city may pay judgments. As quoted below, those provisions enable such city to provide for their payment at the city's option *over ten-year period*; and actions cannot be brought or prosecuted on judgments against such city so long as they are being paid in accordance with the provisions thereof.

The foregoing demonstrates that only a deposit of reasonable security by the City *in advance* of taking over physical possession of Appellant's water system will protect Appellant's constitutional rights in the premises. Whether Section 1419 of the Public Utilities Code, in dispensing with the requirement of such security under these circumstances, is constitutional, presents a substantial Federal question.

Resolution of that Federal question will determine whether the City legally obtained and retains possession of Appellant's water system.

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legislative body has provided for payment by percentages in successive years, he shall pay to each judgment creditor the percentage of the judgment fixed by the legislative body.

"*Sec. 50175. Percentage payments; right of action on judgment.*

When provision for the payment of any final judgment is made by percentages in successive years, an action upon such judgment may be commenced within five years after the first tax levy which fails to include the percentage of the amount of the judgment fixed by the legislative body. An action shall not be brought or prosecuted on the judgment so long as it is being paid in such annual percentages."

CONCLUSION

It is respectfully submitted that this Court has jurisdiction of this appeal under Section 1257(2), Title 28, United States Code.

Dated: August 3, 1962

Respectfully submitted,

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(Appendices follow)

Appendix A

In the District Court of Appeal of the State of California
in and for the Third Appellate District

3 Civil 10508

CITIZENS UTILITIES COMPANY
OF CALIFORNIA

vs.

THE SUPERIOR COURT
(Sacramento County)

By the Court:

The petition for writ of review and or prohibition
denied.

Dated: April 18, 1962

Pierce,
Presiding Justice

Copy to:
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and Salinger
San Francisco 4

Mr. Raymond McClure
North Sacramento

Mr. Martin McDonough
Sacramento

Appendix B

STATUTES INVOLVED

Each of the statutes hereafter quoted are sections of the California Public Utilities Code:

Section 1402. "As used in this chapter, 'political subdivision' means county, city and county, city, municipal water district, county water district, irrigation district, public utility district, or any other public corporation."

Section 1403. "Any political subdivision may, at any time, file with the commission either a petition of the first class, setting forth the intention of the political subdivision to acquire under eminent domain proceedings or otherwise, the lands, property, and rights of any character whatsoever of any public utility or a petition of the second class, setting forth the intention of the political subdivision to initiate such proceedings as may be required under the law governing the political subdivision for the purpose of submitting to the voters of the political subdivision a proposition to acquire under eminent domain proceedings, or otherwise, the land, property, and rights of any character whatsoever of any public utility."

Section 1404. "Each such petition shall contain the name of the political subdivision appearing as petitioner therein, a description of the land, property, and rights which the political subdivision intends to acquire and the names and addresses of all owners and claimants thereof, including each trustee and mortgagee under each deed of trust and mortgage, if known, or a statement that they are unknown. The petition shall pray that the commission fix the just compensation which shall be paid by the political subdivision, under the law, for such lands, property, and rights.

The petition shall be signed in the name of the political subdivision and verified by the chairman or other presiding officer or by the secretary or clerk of the legislative or other governing body of the political subdivision. At the time the petition is filed, the petitioner shall also file with the commission additional copies thereof equivalent in number to three more than the number of owners and claimants named in the petition."

Section 1411. "When the proceeding has been submitted, the commission shall make and file its written finding fixing, in a single sum, the just compensation to be paid by the political subdivision for the lands, property, and rights. If the commission finds that severance damages should be paid, the just compensation for such damages shall be found and stated separately. The just compensation shall be fixed by the commission as of the day on which the petition was filed with the commission."

Section 1412. "Within 20 days after the commission has made and filed its finding, the owner of the lands, property, and rights may file with the legislative or other governing body of the political subdivision a written stipulation consenting and agreeing to accept the just compensation fixed by the commission. Upon the filing of the stipulation, the political subdivision shall proceed with all due diligence to provide the necessary funds under the law governing the providing of such funds for paying the just compensation fixed by the commission. Whenever the just compensation has been tendered by the political subdivision, a deed of grant, bargain, and sale conveying the owner's right, title, and interest in and to the lands, property, and rights to the political subdivision shall be executed and delivered by the owner, and the other claimants who have any right, title, or interest in the property shall execute appropriate instru-

ments conveying or releasing to the political subdivision their respective rights, titles, and interests therein. If the deed or the instruments of conveyance or release are not executed and delivered within 60 days after such tender has been made, the political subdivision may commence an action in a court of competent jurisdiction or proceed under Section 1413."

Section 1413. "In the case of a petition of the first class, if the owner does not file the stipulation within such 20 days, the political subdivision, within 60 days after the commission has made and filed its finding, shall commence an action in a court of competent jurisdiction to take such lands, property, and rights, under eminent domain proceedings. In the case of a petition of the second class, if the owner does not file the stipulation within such 20 days, the political subdivision, within 60 days after the commission has made and filed its finding, shall initiate proceedings for the purpose of submitting to its voters a proposition to acquire under eminent domain proceedings the lands, property, and rights. The political subdivision shall not be required, in either case, to delay for more than 20 days after the commission has made and filed its finding, before commencing such further proceedings. In the case of a petition of the second class, if the voters of the political subdivision, as provided by the law governing the political subdivision, vote in favor of any proposition to acquire under eminent domain proceedings, or otherwise, such lands, property, and rights, the political subdivision shall, within 60 days thereafter, commence an action in a court of competent jurisdiction to take such lands, property, and rights, under eminent domain proceedings, unless the owner has filed with the political subdivision a written stipulation consenting and agreeing to accept the just compensation fixed by the commission."

Section 1416. "The finding of the commission fixing the just compensation to be paid by the political subdivision for the lands, property, and rights shall be final and shall not be subject to modification, alteration, reversal, or review by any court of this State. If the court in which the political subdivision has commenced its action, subsequent to the making and filing by the commission of its finding as to just compensation, decides that the political subdivision has the right and power under the law to take the lands, property, and rights, it shall enter a judgment in favor of the complainant in the action, fixing as the just compensation which shall be paid for the taking of the lands, property, and rights, the just compensation fixed by the commission. The judgment may include the allowance of such costs between the parties as is provided for in the law of eminent domain of this State. The judgment of the court insofar as it refers to the just compensation to be paid for the lands, property, and rights, shall be final and shall not be subject to modification, alteration, reversal, or review by any court except as specified in this chapter. The judgment of the court shall include a provision, in substance, that it is subject to modification by reason of such increase or decrease in the just compensation to be paid as may thereafter be certified to the court by the commission, as provided in this chapter."

Section 1417. "At any time within 30 days subsequent to the entry of such judgment, the owner of the lands, property, and rights may file with the commission a verified petition in writing, alleging that by reason of expenditures made by the owner subsequent to the date of the filing of the original petition with the commission, for the purpose of preserving or improving the lands, property, and rights, or by reason of other acts and occurrences subsequent to that date, the just compensation theretofore fixed by the commission

should be increased, and praying that the commission make its finding increasing such compensation. At any time within 30 days subsequent to the entry of the judgment, the political subdivision may file with the commission a verified petition in writing, alleging that by reason of loss or destruction of the lands, property, and rights, or by reason of depreciation or deterioration thereof or by reason of other acts and occurrences, subsequent to the date of the filing of the original petition, the just compensation theretofore fixed by the commission should be decreased, and praying that the commission make its finding decreasing the compensation. The commission shall in each instance cause a copy of such petition or petitions to be served upon each party other than the petitioner, who was named as the political subdivision, owner, or claimant in the original proceeding before the commission, together with a written notice specifying the time and place of hearing on such petition or petitions, which time shall be within 45 days after the entry of the judgment by the court, and shall cause written notice of the time and place of the hearing to be served upon each petitioner in such petition or petitions. If both such petitions are filed, the commission may consolidate them for hearing and decision."

Section 1418. "After a hearing, the commission shall make and file its finding fixing, as of the date on which the finding is made and filed, the extent to which the just compensation theretofore fixed should be increased or decreased by reason of the matters alleged in the petition or petitions. If the claim is made that the just compensation theretofore fixed by the commission should be increased by reason of expenditures made by the owner subsequent to the date of the filing of the original petition with the commission for the purpose of preserving or improving the lands, property, and rights the commission may increase the just compensation

only to the extent to which the commission determines that such expenditures were beneficial to the lands, property, and rights, and reasonably and prudently made. The finding of the commission fixing the extent to which the just compensation theretofore fixed should be thus increased or decreased shall be final and shall not be subject to modification, alteration, reversal, or review by any court of this State."

Section 1419. "The commission shall thereupon transmit to the court its finding, certified under the seal of the commission, fixing the extent to which the just compensation theretofore fixed by the commission shall be increased or decreased. The court shall thereupon modify its judgment so as to conform with the finding of the commission. The judgment of the court, as thus modified, insofar as it refers to the just compensation to be paid for the lands, property, and rights, shall be final and shall not be subject to modification, alteration, reversal, or review by any court. The filing of either or both the petitions specified in Section 1417 shall not act as a stay of the judgment in condemnation, but upon the payment of the just compensation fixed in the original judgment of condemnation the plaintiff in the action shall be entitled to immediate possession of the lands, property, and rights."

Appendix C

In the Superior Court of the State of California in and for the County of Sacramento

No. 116092

City of North Sacramento, a municipal corporation,

Plaintiff,

vs.

Citizens Utilities Company of California, a corporation,

Defendant.

INTERLOCUTORY JUDGMENT OF CONDEMNATION

The above cause came on duly and regularly for trial on the fifth day of May, 1959, before the court without a jury, plaintiff appearing by its attorneys RAYMOND McCLURE and MARTIN McDONOUGH, and defendant appearing by its attorneys CLAUDE N. ROSENBERG and WILLIAM FLECKLES; and evidence both oral and documentary having been introduced and the cause submitted for decision, and written findings of fact and conclusions of law having been made,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I.

That defendant Citizens Utilities Company of California is the owner of the lands, property, and rights sought in

this proceeding and described in the complaint herein, which lands, property, and rights are hereinafter particularly described.

II.

That plaintiff City of North Sacramento has the right and power under the law to take the said lands, property, and rights for the uses and purposes set forth in the complaint.

III.

That the use to which the lands, property, and rights sought in this proceeding are to be applied is a use authorized by law; and that the proposed public utility is a public necessity.

IV.

That the lands, property, and rights sought in this proceeding and described in the complaint herein comprise a municipal water system necessary for, and used and useful for the supply, transmission, and distribution of water for domestic and municipal purposes for the plaintiff and its inhabitants.

V.

That the taking of the said lands, property, and rights comprising said municipal water system is necessary for the proposed use, and the use to which said lands, property, and rights and said system are to be applied is a more necessary public use than the public use to which said lands, property, and rights are already appropriated.

VI.

That the just compensation to be paid for the said lands, property, and rights is the sum of $2,206,000, which sum is subject to modification by reason of such increase or

decrease as may hereafter be certified to this Court by the Public Utilities Commission of the State of California, as provided by sections 1416 to 1419, inclusive, of the Public Utilities Code.

VII.

That the filing of petitions to the said Public Utilities Commission for increase or decrease of the just compensation shall not act as a stay of this judgment in condemnation, but, as provided in section 1419 of the Public Utilities Code, upon the payment of the sum of $2,206,000 the plaintiff herein shall be entitled to immediate possession of the said lands, property, and rights.

VIII.

That plaintiff is entitled to, and is hereby awarded, the relief prayed for in its complaint, and the lands, property, and rights described in the complaint and hereinafter particularly described which comprise said municipal water system are hereby taken and condemned for public use for the uses and purposes set forth in the complaint, in accordance with the Conclusions of Law filed herein; and upon payment of the $2,206,000, subject to modification as provided in Paragraph VI above, to the defendant, or deposit of the moneys in Court for the defendant, the Court shall enter a final order of condemnation adjudging and decreeing that the said condemnation and taking shall be complete and final and that plaintiff shall fully have, own and possess the lands, properties and rights sought in this proceeding comprising the municipal water system referred to in Paragraph IV hereof for the uses and purposes set forth in the complaint herein.

IX.

That the following is a description of the lands, property, and rights described in the complaint comprising the defendant's said municipal water system and herein ordered to be taken and condemned:

(a) Those water production, storage and distribution facilities shown on Exhibit "B" hereto and located within an area within the County of Sacramento, State of California, bounded and described as follows:

Beginning at the intersection of the easterly line of the Western Pacific Railroad right of way with the northerly line of the Sacramento-Roseville freeway (U. S. Highway 40); thence northerly along said easterly line of the Western Pacific Railroad right of way to its intersection with a westerly projection of the northerly line of Bell Avenue; thence easterly along said projection of the northerly line of Bell Avenue, and along the northerly line of said Bell Avenue, to the latter's intersection with the northerly projection of the easterly line of 24th Street, sometimes known as Winters Street; thence southerly along said northerly projection of the easterly line of 24th Street, and along the easterly line of 24th Street, and along a southerly projection of said easterly line of 24th Street, to the intersection of said southerly projection of the easterly line of 24th Street with the westerly line of the Southern Pacific Railroad right of way; thence southerly along said westerly line of the Southern Pacific Railroad right of way to its intersection with a northerly projection of the easterly line of 18th Street, sometimes known as Plover Avenue; thence southerly along said northerly projection of the easterly line of 18th Street, and along the easterly line of 18th Street, and along a southerly projection of the easterly line of 18th Street, to a point 450 feet south of the south line of Silica Avenue; thence westerly and parallel to the said

south line of Silica Avenue and its westerly extension to the intersection thereof with the westerly line of the Sacramento-Roseville freeway (U. S. Highway 40); thence southerly and westerly along said westerly line of the Sacramento-Roseville freeway to the point of beginning.

together with all water pipe lines, water mains, tanks, treatment facilities, pumping stations, pumps, service connections, and meters and meter housings, and all other water storage, transmission and distribution facilities physically connected thereto: but not including (i) any fire hydrants, wherever located; or (ii) service connections, or any facilities physically connected thereto except meters, beyond the curb line or property line of premises served abutting upon a street, other thoroughfare, utility right of way or easement. The facilities described in this paragraph (a) are all physically connected to, and are all of the facilities physically connected to the wells located on those parcels of land described in paragraph (b) next:

(a-1) Those three water pipe lines, and service connections, meters and meter housings physically connected thereto, which are physically connected to water pipe lines described in subdivision (a) hereof, but which extend outside the area described in said subdivision (a) hereof, in the following locations, as shown in Map 1 of Exhibit "B" hereof:

(1) lying along Grand Avenue east of said area;

(2) lying along Roanoke Avenue east of said area;

(3) crossing the Sacramento-Roseville freeway (U. S. Highway 40) and extending along said freeway near the southwest corner of said area.

(b) Those parcels of land, and the improvements thereon and appurtenances thereto described in Exhibit "C" hereto attached and hereby made a part hereof;

(c) Any and all rights that may have accrued by virtue of the provisions of section 19 of Article XI of the Constitution of the State of California, as said section was written prior to the amendment to said section which was adopted on October 10, 1911, to maintain, or place and maintain, the said municipal water system or any part or portion thereof;

(d) Each and all rights existing by virtue of any or all franchises granted by the County of Sacramento to maintain, or place and maintain, the said municipal water system or any part or portion thereof;

(e) The rights of way and easements to maintain, or place and maintain, the said municipal water system or any part or portion thereof, whether existing by virtue of grant, prescription or otherwise.

The system, lands, property, and rights referred to in this paragraph as being that which plaintiff seeks to acquire are substantially the same system, lands, property, and rights referred to in paragraphs I, IV and V above. The lands, property, and rights referred to in this paragraph which are situated outside the exterior boundaries of plaintiff are essentially a part of defendant's municipal water system within the boundaries of plaintiff.

X.

That defendant is entitled to its costs as provided by law in the sum of ..... Dollars ($).

Given and rendered in open court this 5th day of Nov., 1959.

JOHN QUINCY BROWN
Judge of the Superior Court

Attest: C. C. LARUE, *Clerk*
By: G. L. SWETZER
Deputy Clerk

[Seal]

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 330

CITIZENS UTILITIES COMPANY OF CALIFORNIA, a corporation,
Appellant,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO, and CITY OF NORTH SACRAMENTO, a municipal corporation (Real Party in Interest),
Appellees.

Appeal from the Judgment of the District Court of Appeal, State of California, in and for the Third Appellate District

MOTION TO DISMISS OR AFFIRM

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Real Party in Interest.

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Appellees.

Appeal from the Judgment of the District Court of Appeal, State of California, in and for the Third Appellate District

MOTION TO DISMISS OR AFFIRM

Appellee City of North Sacramento, Real Party in Interest, moves to dismiss this appeal or affirm th

judgment below on the grounds (a) that the appeal does not present a substantial question, and (b) that the federal question sought to be reviewed was not timely nor properly raised.

STATEMENT

The following is a briefer statement of the relevant facts which are not controverted that are contained in Appellant's Statement as to Jurisdiction:

This appellee, herein called "City", has condemned the municipal water system formerly owned by appellant in the California courts; has sold bonds and paid into court from bond proceeds the full amount of the just compensation established for the system as of the start of the condemnation procedure; and has taken possession under authority of court orders. The City has been in full possession of the system since May 25, 1962.

The procedure followed is admittedly in accordance with California statutes, sections 1402 to 1419, inclusive, of the Public Utilities Code,[1] and with orders of state courts made pursuant to them. These statutes further provide, in sections 1417 to 1419, that the Public Utilities Commission, which fixed the just com-

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[1]Set out in full in Appendix B of the Jurisdictional Statement. These statutes were enacted as Section 47(b) of the Public Utilities Act by Stats. 1913, ch. 339, p. 682, validated by subsequent constitutional amendment, see *Marin Water & Power Co. v. Railroad Commission*, 171 Cal. 706 at 710, 154 Pac. 864 at 866. They have been used many times, see, e.g., *Sacramento Municipal Utility District v. Pacific Gas and Electric Co.*, 72 Cal. App. 2d 638, 165 P.2d 741.

pensation originally, shall, in a supplemental proceeding, determine the amount of any additional award that shall be made on account of specified acts and occurrences after the start of the proceedings; but that the condemnor may acquire the properties upon payment of the original award, and need pay the additional award only after it is determined and certified to the court.

Although the Interlocutory Judgment of Condemnation also specifically provided for acquisition of the system upon payment of the original award, and before the supplemental award is determined, in accordance with the statutes, and although appellant here appealed that Interlocutory Judgment to the California District Court of Appeal and the California Supreme Court, it raised no issue on this part of the judgment, or any federal question whatever.

After that judgment was affirmed, however, and became final, and when the City was in the final stages of selling its bonds, appellant here applied to the trial court twice, the District Court of Appeal three times, and the California Supreme Court once,[2] for relief, on the ground that the statutory provision for possession upon payment of the original award, without giving security for payment of an additional award, violates both the state and federal constitutions. In each case relief has been denied, the order denying relief on the first application to the District Court

[2] All as recited in the Jurisdictional Statement at pages 10-13, except that the third application to the District Court of Appeal for supersedeas, which was denied May 29, 1962, is not mentioned.

of Appeal being the order under appeal here. The issue as to the State Constitution has of course been settled below.

ARGUMENT

The decision of the California District Court of Appeal appealed from, being a denial of a writ of "Review and/or Certiorari" as to which the California Supreme Court denied a hearing, is believed to be entirely correct.

(1) There is no substantial constitutional issue. The provisions in the federal constitution for time of payment of just compensation are less restrictive than those in the California Constitution, which requires payment in advance, in most cases. The federal constitution does not, under the decisions of this Court, require advance payment, or set any arbitrary standards.

The cases cited by appellant show the proper rule; none of them invalidate a statute.

In the case of *Sweet v. Rechel*, for instance, the state authorized taking of property without any advance payment or deposit whatever, and relegated the claimant to a judgment against the city. This Court held that the city nevertheless had full title to the condemned property; it said that there was no constitutional inhibition:

> "It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property

> for public uses, directs the regular ascertainment, without improper delay and in some legal mode of the damages sustained by the owner, and gives him an unqualified right to a judgment for the amount of such damages which can be enforced, that is, collected, by judicial process."[3]

In another case, cited by appellant, *Crozier v. Fried. Krupp Aktiengesellschaft*,[4] this Court upheld the constitutionality of a federal taking without any advance payment or deposit whatever, relegating the owner to a suit against the United States in the Court of Claims, where presumably an appropriation by act of Congress would be required.

This Court defined what we believe to be the essence of the federal constitution as to just compensation, that is

> ". . . the pledge, either expressly or by necessary implication, of the public good faith to that end."[5]

In *Williams v. Parker*, cited by appellant, it is significant that the agreed statement of facts indicated that there was no expressed statutory power to raise, appropriate or pay the money which might be recovered. The court said that the "adequate provision for compensation" test was satisfied by a provision that the person whose property was taken could recover "in the manner prescribed by law."[6]

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[3] *Sweet v. Rechel*, 159 U.S. 380 at 402.
[4] 224 U.S. 290.
[5] P. 306.
[6] 188 U.S. 491 at 503.

Appellant makes some point of the fact that much public property is exempt from execution under California law.[7] This situation is not peculiar to California; McQuillin[8] states it as a general rule, existing independent of express statutory provisions, for public agencies generally. This general rule is presumably well known to this Court, which decided some of the cases on which McQuillin relies;[9] yet it upheld the state statutes in each of the cases cited by appellant notwithstanding.

The City's Official Statement, in connection with the sale of its bonds, referred to in appellant's Jurisdictional Statement,[10] shows that the City now has at least sufficient money from the sale of its bonds to pay its own estimate of the maximum supplemental award.[11] However, appellant's statement that "the City must look to the proceeds from its bond sale as the only source from which to pay the amount of (additional) just compensation" is not correct and has no support in the record; but more importantly, that statement is contradicted by the statutes which appellant cites under which the City is required to

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[7]Jurisdictional Statement, p. 15.

[8]Municipal Corporations, 3d ed., vol. 10, Sec. 28.57.

[9]See for instance *New Orleans v. Louisiana Construction Co.*, 140 U.S. 654.

[10]Clerk's Transcript on Appeal, vol. 1, Exh. F, pp. 1, 5.

[11]Applicant's contention for a larger figure (see p. 10 of the Jurisdictional Statement) is based on a theory rejected by the California Public Utilities Commission in *Application of City of Redding*, 20 CRC 1022. Note that under California law the Commission acts in a judicial capacity in these just compensation cases. *Southern California Edison Co. v. Railroad Commission*, 6 Cal. 2d 737, 59 P.2d 808.

levy a tax to pay the balance of any unsatisfied judgment against it.[12] A judgment for which a tax must be levied gives appellant the security to which it is entitled under the decisions of this Court cited above.

The Jurisdictional Statement shows that appellant received, prior to the taking, full just compensation established as of the beginning of proceedings, and that if the Public Utilities Commission determines that an additional award is proper, based on events occurring during the pendency of the proceeding, appellant will have a valid judgment for the additional amount which can be enforced against the City under California law. Due process requires no more, under the decisions of this Court.

(2) The decision below is also correct because the appellant waited too late to raise the constitutional issue. As already pointed out, the interlocutory judgment which was appealed, and affirmed on appeal, and became final expressly provided for the taking upon payment of the original award, and that the pendency of the supplemental proceeding should not stay the judgment, but the City should be entitled to immediate possession upon payment of the original award.

Under California law, the Interlocutory Judgment of Condemnation establishes the right to take, and all the conditions pertaining to it. The Final Order merely shows that the conditions of the Interlocutory Judgment have been complied with.[13]

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[12]P. 15.

[13]California Code of Civil Procedure, Sections 1264.7, 1253.

This Court is being asked in this appeal to reverse the decision of the California courts affirming the Interlocutory Judgment of Condemnation, although there is no showing that a federal question was raised on that appeal, and in fact none was, as shown by the reported decision of the California District Court of Appeal[14] and although that judgment is final beyond attack. This Court held in *Chicago, Indianapolis & Louisville Ry. Co. v. Hackett*[15] that it would not determine a question of federal constitutionality not set up in the court below. The attempt of appellant to raise the question in the California courts and in this Court by writ proceedings after the judgment became final on appeal would avoid that salutary rule, and suspend the finality of judgments indefinitely.

That finality of judgment is not unimportant is shown by the fact that a consequence of appellant's choice not to raise the constitutional question on the former appeal is that after the Interlocutory Judgment of Condemnation became final, the City under California law, with exceptions not material here, had only one year to sell its bonds and pay the award.[16] By waiting to attempt to raise the constitutional issue on writ proceedings only three months before the expiration of this period, appellant created the dan-

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[14]192 Cal. App. 2d 482, 13 Cal. Rptr. 538, *City of North Sacramento v. Citizens Utility Company of California*. Appellant has never contended that this failure to raise the constitutional question on the appeal from the judgment was inadvertent; see Clerk's Transcript on Appeal, vol. I, p. 22 ff.

[15]228 U. S. 559.

[16]California Code of Civil Procedure, Section 1251.

gerous problem for the City that even though the contention had no merit, appellant might be able to impair the City's ability to sell its bonds and pay the award past the deadline date, a fact of which appellant was of course aware.

By keeping silent on an alleged constitutional issue which clearly appeared from the Interlocutory Judgment, appellant did not preserve it to assert whenever it might be most harmful, but lost it entirely. The California courts have acted peremptorily on appellant's contentions since the judgment became final on appeal.

CONCLUSION

We respectfully submit that the appellant presents no substantial question for the decision of this Court; and that the question which appellant attempts to raise could and should have been raised on the appeal from the judgment/and before that judgment became final on appeal. Therefore the appeal should be dismissed, or the judgment below affirmed.

Dated, Sacramento, California,
August 27, 1962.

MARTIN McDONOUGH,
Counsel for Appellee
City of North Sacramento,
Real Party in Interest.

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In the Supreme Court of the United States

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Appellees.

Appeal From the Judgment of the District Court of Appeal, State of California, in and for the Third Appellate District.

Appellant's Reply to Motion to Dismiss or Affirm

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In the Supreme Court of the United States

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Appellees.

Appeal From the Judgment of the District Court of Appeal State of California, in and for the Third Appellate District.

Appellant's Reply to Motion to Dismiss or Affirm

Appellee CITY OF NORTH SACRAMENTO has moved to dismiss or affirm herein on twofold grounds: 1) the alleged absence of a substantial constitutional question and 2) that the constitutional question was not timely raised. Appellant's contentions in opposition to the motion can be summarized as follows:

1. Appellant contends that determination of the constitutionality of the public taking of private property upon payment of *partial* "just compensation" and without provision insuring prompt payment of the balance thereof involves a substantial question arising under the "due process" clause of the 14th Amendment.

2. Appellant contends that under the particular facts of this case, its motion to stay execution on the Interlocutory Judgment of Condemnation was the proper and timely mode of raising such constitutional question.

I.

THE CONSTITUTIONAL ISSUE IS SUBSTANTIAL

Appellee is *partially* correct in its recitation of the rule of federal "due process" relating to the time of payment of "just compensation". The Federal Constitution indeed does not require advance payment of "just compensation", or establish any standard of what *factually* insures "due process" and what does not. (See Motion to Dismiss, etc. p. 4). It does, however, as repeatedly declared by this Court, require that there be adequate provision for a reasonably just and prompt ascertainment and *payment* of compensation following a taking. (See cases cited, "Statement as to Jurisdiction" p. 14)

Significantly, Appellee has not cited a single decision which disagrees with this principle. Rather, it seeks to dissuade this Court from considering whether the rule has been violated in *this* case because the court has determined it not to have been breached in cases involving other facts and different statutes. In other words, the rule does not apply here because it did not apply elsewhere.

The taking of private property without "just compensation" constitutes a deprivation of "due process" under the 14th Amendment to the federal constitution:

Appleby v. Buffalo, (1911) 221 U.S. 524; 530;
Dohany v. Rogers, (1930) 281 U.S. 362.

The question of whether a property owner has been deprived of his property without "just compensation" is not always easily reconcilable:

> "The constitution declares that private property shall not be taken for public use without just compensation. It does not require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed. *Whether a particular provision be sufficient to secure the compensation to which, under the constitution, he is entitled, is sometimes a question of difficulty.* (Emphasis added).
>
> *Cherokee Nation v. Southern Kansas R. Co.*, (1889) 135 U.S. 641, 659;
>
> *Sweet v. Rechel*, (1895) 159 U.S. 380, 402.

In this case the statutory procedure followed by Appellee (California Public Utilities Code, §§ 1401-1421) (Appendix B, "Statement as to Jurisdiction"), provides that after the judgment of condemnation is entered in the court action, the owner may file a petition with the California Public Utilities Commission asking that Commission to assess the increase in "just compensation" due for the property, which has occurred as the result of "expenditures made by the owner subsequent to the date of filing of the original petition with the Commission, for the purpose of preserving or improving the lands, property and rights, or by reason of other acts and occurrences subsequent to that date. . . ."

(California Public Utilities Code, § 1417). (A corresponding application by the condemnor for a decrease in the original award may also be filed). Notwithstanding, Section 1419 of the Code declares:

> "... The filing of either or both the petitions specified in Section 1417 shall not act as a stay of the judgment in condemnation, *but upon the payment of the just compensation fixed in the original judgment of condemnation the plaintiff in the action shall be entitled to immediate possession of the lands, property, and rights.*" (Emphasis added.)

Thus Section 1419 under which Appellee has sought to justify its right to take possession herein is completely silent on the question of *when, where and how* Appellant will receive the balance of "just compensation" which shall be decreed due it in the supplementary proceedings before the California Public Utilities Commission. It is apparent that under the acquisition arrangement which the California courts sanctioned in this matter in mid-1962, when the final assessment of "just compensation" is amended into the Interlocutory Judgment of Condemnation, Appellant will find itself having experienced the involuntary conversion of its utility system into a partially-satisfied judgment against a municipal condemnor.

In view of the poor financial condition of Appellee, the provisions of California law regarding immunity of municipal property from execution and the permissible ability of municipalities to stagger payment of judgment debts over a ten-year term (see statutes quoted "Statement as to Jurisdiction", pp. 15-16), Appellant submits that it cannot be fairly conceded that there is any "reasonable, certain and adequate" likelihood that Appellant will realize prompt

payment of the balance of "just compensation" due it as required by the federal "due process" clause.

Appellee contends that the fact that its property is exempt from execution (thus for all practical purposes making enforcement of any judgment by Appellant impossible), is not at all important. It contends this Court is aware that general immunity from execution exists as regards public property but that nevertheless it has upheld state statutes against a similar "due process" attack in other cases Appellant has cited. But the only ground upon which such decisions could offer any support for Appellee's argument would be if this Court had demonstrated in upholding the statutes therein that an unsecured judgment rendered in an eminent domain action against a governmental entity satisfies "due process" *per se*—. In none of the decisions was this the holding. Nowhere has this Court validated as constitutional the relegation of a property owner to a judgment which cannot be readily executed upon and which permittedly need not be paid by the judgment-debtor for a period of 10 years following entry of judgment!

Appellee makes reference to *Sweet v. Rechel*, (1895) 159 U.S. 380, to which Appellant has referred. It contends that although the statute there in question relegated the property owner to a judgment claim against the city, no constitutional defect was found by this Court. Actually the holding in that case did not rest upon the fact that the owner was given a judgment against the condemning authority. It rested on this Court's determination that the judgment in question was an *enforceable* one, i.e., one which could be "effectively enforced by judicial process". (159 U.S. at 406). Significantly, the statute authorizing the taking there provided:

> "When it shall be finally determined what amount of damages any party is entitled to recover against the

> city of Boston . . . or any other party defendant, a separate decree shall be entered accordingly *and execution thereafter shall be issued* without regard to the pendency of claims of any other party or parties or of other claims of such complainant." (159 U.S. at 384).

Appellee further refers to the *Crozier* case, (224 U.S. 290), concluding therefrom that constitutional guarantees of "due process" have been met by the pledge of public faith to make payment and implying that such a pledge may be inferred to proceed from a judgment against a municipal condemnor. The *Crozier* case cannot be so tortured.

In *Crozier* a federal act provided that a patent owner might recover reasonable compensation in the Court of Claims for federal infringement on a U.S. granted patent. This Court declared that a statute providing for compensation after taking was proper if "adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation", and that, "the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of government of the duty to make prompt payment of the ascertained compensation, that is, by the pledge, either expressly or by necessary implication of the public good faith to that end." The opinion evidences this Court's interpretation that there was no doubt that payment of a judgment obtained in the Court of Claims against the United States would be promptly made . . . (the same requiring only a federal appropriation). That payment by this means can properly be termed prompt payment cannot be gainsaid. ". . . Congress always has heretofore appropriated the money required to pay the judgments of the Court of Claims. . . . Nothing but a flagrant breach of good faith could delay the payment." *(Great Falls Mfg. Co. v. Garland,* (1885) 25 Federal 521).

Payment of a judgment against the government by Congressional appropriation is a far cry from the situation here where there is no semblance of any pledge of prompt payment by Appellee City. Furthermore, as we shall discuss hereafter, pledge of the credit of the United States and a pledge of the credit of Appellee City cannot reasonably be placed on any comparable ground.

Appellee lastly refers to *Williams v. Parker*, (188 U.S. 491), which it mistakenly declares we have cited to this Court; it contends that this Court there declared "that the 'adequate provision for compensation' test was satisfied by a provision that the person whose property was taken could recover 'in the manner prescribed by law'". The argument is that this Court declared that realization upon a judgment debt in the fashion prescribed by local law satisfies "due process." Not so! Sections 3 and 4 of the act involved in *Williams* provided that persons claiming injury might recover damages "in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city." This Court did not relate what manner was prescribed by state law for compensating a land owner under such circumstances. It declared, however, that the statute referred to made "suitable provision for such recovery" (188 U.S. at 503). The case did not involve the question of whether a taking of property could precede compensation; but whether "due process" was satisfied by a statute which authorized taking of property by the State of Massachusetts but required the property owner suffering injury to look to the City of Boston, which had no part in the taking, for recompense. The Court concluded that the Legislature had provided a debtor whose solvency was of "substantial permanence" and that moreover "a direct and appropriate

means of ascertaining *and enforcing* the amount of all such damage" had been provided by the act. This case is far removed from the provisions of Section 1419 which are completely silent on the question of how Appellant will enforce its judgment for the balance of "Just Compensation."

Appellee contends our statement that the City must look to the proceeds from its bond sale as the only source from which to pay the amount of "just compensation" is not correct and is without support in the record. (Motion to Dismiss or Affirm, p. 6.) It further maintains that the provisions of the California Government Code to which Appellant has referred, authorizing municipal payment of judgments in percentage installments over a decade, is evidence of its ability to pay the judgment. Appellant has no quarrel with the proposition that the City is empowered to pay the balance of any unsatisfied judgment against it by exercising its general tax powers—but this does not dispell the fact that its Council may decide to levy its tax authority on a percentage basis. This Court can well imagine the significant tax impact on the residents of this 5th-class city which would flow if the balance of the judgment were to be paid by the City all at once. The desire of the City Council to spread out such extra tax burden as long as possible can be easily imagined. It is submitted that Appellant's interest as a property owner demands that it promptly receive payment of entire "just compensation"—not merely a percentage thereof each year. The federal principle of "due process" here involved requires that provision be made for payment of all compensation due "without unreasonable delay" (*Bragg v. Weaver*, (1919) 251 U.S. 57).

Apart from its reference to its general taxing authority, Appellee in no way supports its criticism of Appellant's charge that Appellee is limited to the proceeds from its

bond sale as the only source from which to make prompt payment. Appellee has not demonstrated that it has *any* assets of *any amount* and character currently available for payment of the balance of "just compensation". The record shows by the sworn affidavit of Appellee's City Manager that it was required to incur a bonded debt of $2,500,000 before it could even pay the amount of "just compensation" fixed in the original Public Utilities Commission valuation proceeding.*

In this very motion Appellee has conceded that it is looking to the balance of the bond sale proceeds to pay the supplementary assessment of "just compensation". It would have this Court believe that these proceeds afford Appellant adequate protection because they provide sufficient to pay Appellee's "own estimate" of the maximum supplemental award. (Motion to Dismiss or Affirm, p. 6.) This so-called "estimate" is the absolute epitome of convenient self-serving contention!

Though Appellant filed a *verified* declaration in the trial court in support of its motion to stay execution which demonstrated 1) that during the period December 3, 1956 to January 1, 1962, Appellant had made net additions and betterments to its utility system of the fair value of not less than $539,471.00, and that 2) the system evaluated by the Public Utilities Commission as of December 3, 1956 had appreciated in value by not less than $83,633 during that

*Manager Jack declared:

"... in order to finance the acquisition of said municipal water system the bonds hereinbefore referred to as authorized must be issued and sold; *and that Plaintiff has no sufficient moneys otherwise to pay the sum assessed in said Interlocutory Judgment for the said municipal water system;* that it is therefore necessary that Plaintiff issue and sell its authorized but unissued bonds in order to pay the sum so assessed." (Emphasis added.)

term, *Appellee offered no verified opposition to Appellant's showing.*

We are not surprised that no one would dare to verify the accuracy of Appellee's opposing "estimate." This "estimate" was reached after Appellee had received a letter from the California Public Utilities Commission Staff that as of June 30, 1961 the total net increase in Appellant's utility plant (computed at cost to Appellant) approximated *$448,000!* How Appellee could in good faith arrive at an estimate of $185,000 net additions and betterments for the period ending January 1, 1962 (6 months greater), defies honest comprehension. Assuming that not a single penny of plant were added by Appellant after June 30, 1961, Appellee would depreciate the net additions made to that date by an aggregate of 59%. (One can appreciate how artificial such a depreciation rate is when it is realized that the major items of this utility system constitute water transmission and distribution mains, facilities having *long* lifespans.)

Appellant contends that the question of the constitutional propriety of a statute which authorizes public authority to take over possession of private property upon payment of

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*Appellee's statement in n. 11 at p. 6 of its Motion that "Applicant's [sic] contention for a larger figure is based on a theory rejected by the California Public Utilities Commission in *Application of City of Redding*, 20 C R C 1022", is a clear example of the shocking extremes to which it would go to mislead this Court as to the true status of this case. The California Public Utilities Commission *Redding* decision confined itself to the question of whether in a supplementary valuation proceeding, a utility could claim appreciation on the plant originally valued by the Commission. Less than 15% of Appellant's claim for an increase in the award of "just compensation" of approximately $625,000 relates to a claim for appreciation such as was referred to in the Commission decision. This leaves additions and betterments amounting to approximately $540,000 which have been added to Appellant's system through the period ending January 1, 1962 - - - over three months before Appellant's Motion to Stay Execution was argued in the lower Court.

partial "just compensation" and which fails to provide a means of affording reasonable assurance that the balance due will be promptly paid, presents a very serious and substantial issue as to a violation of "due process" under the 14th Amendment. We do not herein contend that a deposit of security is the *sine qua non* of "due process" under all circumstances. We do emphatically contend, however, that a statute which relegates a property owner to the position of a judgment creditor under *these* circumstances must of necessity provide for an advance deposit by the condemnor in order to insure ready enforcement of the judgment.

II.

THE CONSTITUTIONAL ISSUE WAS TIMELY RAISED

Appellee maintains that the constitutional issue cannot now be raised by Appellant because the Interlocutory Judgment of Condemnation has become final following appeal and the constitutional question was not raised at trial or on appeal. Appellee relies on *Chicago, Indianapolis and Louisville Ry. Co. v. Hackett*, (1913) 228 U.S. 559, which actually holds that this Court will not determine a question of federal constitutionality raised for the first time in this Court.

The rule that on appeal from a state court judgment this Court will not review the objection that a state statute is unconstitutional unless timely raised below has been frequently applied. The Court has explained its policy thusly:

> "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose juridical action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not

properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in a state court, consistently refuses to consider any grounds of attack not raised or decided in that court."

McGoldrick v. Compagnie Gen. Transatlantique, (1940) 309 U.S. 433, 434.

It cannot be denied, however, that this Court recognizes that the "due process of law" protection which the 14th Amendment exacts from the states is a "conception of fundamental justice." (*Foster v. Illinois*, (1947) 332 U.S. 134), and that where injustice might otherwise result, this Court *will* consider questions of law which were not only not raised in timely fashion *but which were not passed upon by the lower court at all:*

"Rules of practice and procedure are devised to promote the ends of justice not defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. *Ordinarily rules of practice do not require sacrifice of the rules of fundamental justice.* . . . These decisions and others like them, while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice." (Emphasis added.) (*Hormel v. Helvering*, (1941) 312 U.S. 551, 557-8.)

The above authority is not herein cited to infer that this Appellant failed to raise the federal question in the state

courts or that the same was not timely raised. The authority is cited to demonstrate that even assuming *arguendo* that Appellant had not raised its objection in timely fashion, this Court will not apply the aforesaid rule in utter disregard of the equities of the situation.

The following facts, all of which are amply supported by the record below, demonstrate that the constitutional issue here involved was raised and *was timely* raised in the lower courts:

When this Court examines the "Complaint in Eminent Domain" filed by Appellee in the California Superior Court on November 6, 1958, it will readily discern that nowhere in the *body* of that Complaint was there any reference whatsoever to the circumstances whereunder Appellee as Plaintiff-condemnor might make partial payment and acquire *possession of* Appellant's utility system prior to the payment of full "just compensation" and to completion of the proceeding. The only reference to possession appeared in the *prayer* of the Complaint. It is fundamental law in California that the *prayer* does not constitute any portion of the *cause of action*. (*Merlino v. West Coast Macaroni Mfg. Co.*, (1949) 90 C.A. 2d 106, 112; *39 Calif. Jurisprudence 2d*, "Pleading", § 30), and that a prayer asking for relief to which the pleader is not legally entitled may be disregarded. (*Meyer v. San Francisco* (1907) 150 Cal. 131, 133-5.)

> "The subject matter of an action and the issues involved are determinable *from the facts pleaded*, rather than from the title or prayer for relief. . . . If a plaintiff prays for relief beyond the obvious purpose of the complaint and not warranted by the facts alleged the prayer may be disregarded." (Emphasis added.)
>
> *Weber v. Superior Court*, (1945) 26 Cal. 2d 144, 148.

> "Issues arise upon the pleadings when a fact or a conclusion of law *is maintained* by the one party and is controverted by the other." (Emphasis added.)
>
> *California Code of Civil Procedure*, § 588.

It is apparent then, that the Complaint below did not relate itself to the issues of payment or possession.

Rules regarding the conduct of pre-trial conferences in civil proceedings were introduced into California in 1957.* Their objective is to simplify the trial of lawsuits by placing cases in focus so that the defined and precise issues may be resolved as quickly as possible.

Fitzsimmons v. Jones, (1960) 179 C.A. 2d 5, 8;
Spence v. State of California, (1961) 198 A.C.A.† 337, 343.

To that end the pre-trial rules require that the attorneys for the parties confer in advance of the pre-trial conference "to reach agreement upon as many matters as possible." (Rule 8.2(b)). The attorneys are expressly required to submit joint written statements of the matters agreed upon to the court, and they may join in a written statement of the "factual and *legal contentions* to be made as to the issues remaining in dispute." (Rule 8.2(c)). At the pre-trial conference, the pre-trial judge may consider and act upon the written statements submitted under Rule 8.2 and the statements of the factual and legal contentions made as to the issues remaining. (Rule 8.4.) Following the pre-trial conference, the pre-trial judge is required to execute an order setting forth a delineation of the factual and legal contentions made by each party as to the issues remaining in dispute. (Rule 8.6(a)(1)). The parties are allowed 5 days following service of a copy of the pre-trial order to make requests for corrections and modifications therein and failing such request the pre-trial order is filed in the case.

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*"Rules for the Superior Courts", Rule 8.1-8.12.

†Advance California Appellate Reports.

"When filed, the pre-trial order becomes a part of the record in the case and, *where inconsistent with the pleadings, controls the subsequent course* of the case unless modified at or before trial to prevent manifest injustice." (Emphasis added) (Rule 8.5).

Request for relief from limitations of a pre-trial order must be made by motion. (Rule 8.8).

In the Court condemnation proceeding in this matter below, the parties submitted a joint pre-trial statement. The pre-trial order evidences that only special legal counsel for Appellee appeared at the pre-trial conference to introduce such statement on behalf of both parties. The pre-trial statement *set forth the contentions and issues which the parties mutually agreed existed between themselves.* A cursory inspection thereof reveals that no issue was therein made regarding the conditions whereunder Appellee might be able to take over physical *possession* of Appellant's system (assuming Appellee had legal authority to condemn the same). Nowhere in the nine (9) definite issues jointly enumerated in the pre-trial statement *as incorporated into the lower court's pre-trial order*, is there the remotest reference to the question of possession pending completion of the proceeding. Nowhere in the seven (7) specific contentions *which Appellee framed setting forth its position in the suit* was any mention of the contention that Appellee should be entitled to take over possession of Appellant's water system upon payment of only the sum of $2,206,000 and without regard to the balance of "just compensation" to be assessed in the supplementary valuation proceeding before the State Public Utilities Commission.

The California cases are unanimous in supporting the rule that the delineation of the issues in a pre-trial order controls the course of the proceeding so as to effect the

exclusion of contentions not raised at pre-trial. The California courts have stated:

> "The parties and the court are entitled to rely on their pre-trial order in going to trial."
>
> *Gordon v. Reynolds*, (1960) 187 A.C.A. 507; 10 Cal. Rptr. 73, 75;
>
> *Baird v. Hodson*, (1958) 161 C.A. 2d 687;
>
> *Campbell v. Magana*, (1960) 186 A.C.A. 793; 8 Cal. Rptr. 32, 35.
>
> (Joint pre-trial statement incorporated into the pre-trial order by reference held to eliminate an issue not therein enumerated).

These authorities attest to the fact that under Rule 8.8, that portion of the Interlocutory Judgment of Condemnation which purported to authorize the acquisition of possession by Appellee pending completion of the proceedings was outside of and beyond the issues in the case.

Importantly, even the judge that tried this case interpreted the issues, in light of the pleadings and the pre-trial conference order, as not embracing the issue of Appellee's right to take possession pending completion of the proceeding. In his Memorandum Opinion after trial dated October 5, 1959 he clearly indicated that he understood that the issues presented at trial dealt only with a) Appellee's power to condemn property outside its municipal boundaries and b) whether it was necessary for Appellee to condemn portions of Appellant's water system outside municipal boundaries.

This court will appreciate from examination of Section 1416 of the Public Utilities Code (see Appendix B, p. 5, "Statement as to Jurisdiction"), that while the Interlocutory Judgment in a condemnation action such as this must contain the provision that it is subject to modification by

reason of such increase or decrease in just compensation as may thereafter be certified to the court by the California Public Utilities Commission, there is no requirement that the judgment as entered refer to payment, possession or final judgment. These latter questions relate to procedural considerations and as such to matters which might very well have been changed before the time for their application in this case arose. As the provisions of the California Public Utilities Code relating to eminent domain are procedural rather than substantive, they are subject to change even as regards pending actions.

City of Los Angeles v. Oliver, (1929) 102 C.A. 299, 315, 319.

It is therefore manifest that the portion of the Interlocutory Judgment relating to payment and possession was not intended by the trial Court as a "final" adjudication on these subjects.

In California, in order to be appealable a judgment must be "final". (*California Code of Civil Procedure*, § 963); An appeal by Appellant following entry, from those portions of the Interlocutory Judgment relating to possession, would therefore have been subject to dismissal on grounds of prematurity.

It is furthermore apparent that at trial it was *wholly unnecessary* for the trial Court to have incorporated into its judgment any reference to payment, possession or final judgment for the purpose of resolving the issues framed by the parties. Under California law these are all matters that are expressly covered by statute and which follow as a matter of law *to the extent that the law is valid*. The Court's reference to the taking of possession and payment thus constituted not an adjudication *defining and creating*

rights but only a *recitation* of what the future procedure would be as provided by existing statutes. In this regard, the language of the judgment was similar to a recitation in an interlocutory decree of divorce in California that upon expiration of one year the prevailing party shall be entitled to a final decree. The final decree could be obtained in the manner provided by law in the absence of any provision therefor in the interlocutory. Thus to the extent the judgment here purported to authorize possession in accordance with the provisions of Section 1419 of the Public Utilities Code it added nothing. An appeal from such judgment would accomplish nothing—. If this language had been deleted from the judgment on appeal, Appellee was still in position to seek to acquire possession on the very same terms by direct reliance on Section 1419.

The question then arises as to when and by what means Appellant should have raised the constitutional objection here asserted.

It is clear that when the Interlocutory Judgment of Condemnation was entered in November 1959 Appellee could not pay the same. This is evidenced by the fact that although the judgment was affirmed on appeal in July 1961—over 20 months later, Appellee was even then forced to file a request under California Code of Civil Procedure § 1251 for a one-year extension within which to sell bonds to pay the amount referred to in the judgment in order to avoid a decree that it had abandoned the condemnation.

Having requested and received the one-year extension, Appellee still was not under legal obligation to proceed with the matter; it could still have abandoned the condemnation at its election. But if it undertook to sell its bonds, the proceeds would have to be devoted to purposes consistent with the authority previously obtained from its electorate

and consistent with the representations made by it to its bond buyer. A formal Resolution by Appellee's Council calling for bids on bonds and authorizing representations to be made in connection with their sale and regarding disposition of bond proceeds would however constitute formal overt evidence of election to proceed.

Although as we have stated the Interlocutory Judgment of Condemnation was affirmed in July 1961, apart from securing the one-year extension under Section 1251, Appellee did nothing—took no steps whatsoever to sell its bonds—*until March 19, 1962*. (By this time the deadline date to avoid abandonment was a bare four months away.) On that date it adopted its Resolutions Nos. 2650 and 2651 providing for the issuance of two and a half million dollars ($2,500,000) in water revenue bonds, authorizing and directing their sale and establishing an early April date for receiving bids. At this time Appellant was well aware of the statement, made for the first time by Appellee's special legal counsel *after the Interlocutory Judgment was affirmed on appeal*, that Appellee would attempt to take over Appellant's water system by paying only the sum of $2,206,000 wholly without regard to the increase in compensation to be decreed in the supplementary valuation proceedings before the Public Utilities Commission. Accordingly, eleven days following receipt of advice of the action taken by Appellee in adopting such Resolutions, and bearing the aforesaid statement by Appellee's counsel in mind, Appellant filed its Motion in the trial Court to stay execution of the Judgment of Condemnation until full payment of just compensation was made or reasonable security therefor was provided by Appellee. Appellant therein contended that its rights under the State Constitution and under Section 1 of the 14th Amendment to the Federal Constitution were in peril unless a security deposit was made by Appellee

It is submitted that condemnation proceedings are not card games where the parties are left to speculate as to the position of their adversaries. This Court and the Federal Congress have clearly evidenced that each opposes "litigation by ambush." To that end both branches have repeatedly exercised their authority to insure that litigants receive full and complete disclosure of the contentions of their adversaries, so that valuable rights may not be prejudiced by chicane or lost through adherence to technicality.

It is submitted that in view of the proceedings to date in this matter, Appellant has unquestionably raised the federal question in the most appropriate and timely fashion. It is submitted that it would be a grave dereliction of the duty of this Court were it to decline to consider the substantial constitutional question here involved. It is submitted that if the Court were to decline to exercise jurisdiction herein it would only encourage other public authorities to resort to additional artful devices to place property owners in positions where they could not readily assert the deprivation of their constitutional rights before this Court.

For all of the above reasons, it is respectfully requested that this Honorable Court deny Appellee's Motion to Dismiss or Affirm, and that it enter its order noting "probable jurisdiction."

Respectfully submitted.

ALVIN H. PELAVIN
Counsel for Appellant.

of Counsel

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In the Supreme Court of the United States

OCTOBER TERM 1962

No. 330

CITIZENS UTILITIES COMPANY OF CALIFORNIA, a corporation,

Appellant,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO, AND CITY OF NORTH SACRAMENTO, a municipal corporation (Real Party in Interest),

Appellees.

Appeal from the Judgment of the District Court of Appeal, State of California, in and for the Third Appellate District.

Appellant's Petition for Rehearing

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Appellees.

Appeal from the Judgment of the District Court of Appeal, State of California, in and for the Third Appellate District.

Appellant's Petition for Rehearing

Appellant, CITIZENS UTILITIES COMPANY OF CALIFORNIA, respectfully petitions this Honorable Court under Rule 58 of its Revised Rules for rehearing of its Decision of November 5, 1962 ordering dismissal of this Appeal for "want of a substantial federal question".

The instant Appeal was filed for the purpose of securing review by this Court of the lawfulness of a decision of the

District Court of Appeal of California, Third Appellate District, denying Appellant's Petition for Writ of Review and/or Prohibition, wherein Appellant requested that honorable court to review the legality of an order of the Superior Court of Sacramento County denying Appellant's "Motion to Stay Execution of Judgment of Condemnation" in proceedings pending therein. The eminent domain action referred to was commenced by the City of North Sacramento, a municipal corporation (real party in interest herein), for the purpose of acquiring the public utility water system owned, operated and maintained by Appellant within and adjacent to the territorial boundaries of said City in Sacramento County. The subject motion was filed by Appellant in order to prevent the City from taking over physical possession of Appellant's utility system until it had at least secured payment of the full measure of "just compensation" to be determined due Appellant in the proceedings which were then pending before the California Public Utilities Commission and the Superior Court for the County of Sacramento in accordance with provisions of the California Public Utilities Code. (See "Statement as to Jurisdiction", pp. 6-13.)

In dismissing this Appeal, this Honorable Court has approved the taking of physical possession of Appellant's utility system upon deposit of only $2,206,000, a sum conceded by the City to constitute *only a portion* of the "just compensation" to be determined due (see Motion to Dismiss or Affirm, p. 6; Statement as to Jurisdiction, p. 10), and without requiring the City to deposit a single penny of security for payment of the *balance* of such "just compensation".

The rule long adhered to by this Court is that although "due process" does not require that a property owner

actually receive compensation in advance of being dispossessed from his property in an eminent domain proceeding, he must, *at the very least*, receive reasonable, certain and adequate assurance that if he surrenders possession in advance, payment of "just compensation" will not be unreasonably delayed after the amount of the same has been assessed.

Dohany v. Rogers (1930), 50 S.Ct. 299; 281 U.S. 362; 74 L.Ed. 904;

Hays v. Seattle (1920), 40 S.Ct. 125; 251 U.S. 233; 64 L.Ed. 243;

Crozier v. Fried. Krupp Aktiengesellschaft (1911), 32 S.Ct. 488; 224 U.S. 290; 56 L.Ed. 771;

Sweet v. Rechel (1895), 16 S.Ct. 43; 159 U.S. 380; 40 L.Ed. 138;

Cherokee Nation v. Southern Kansas R. Co. (1889), 10 S.Ct. 965; 135 U.S. 641; 34 L.Ed. 295.

The order of this Court dismissing this appeal has necessarily required Appellant to accept a judgment against the City as its only security that there will not be an unreasonable delay in the prompt payment of full "just compensation". We have assumed therefore that this Court premised its order of dismissal upon a determination that because the condemnor is a municipal corporation, a judgment for compensation against it will, by and of itself, afford sufficient protection to safeguard Appellant's constitutional rights as a property owner.

If we are correct in our assumption, we respectfully submit that this Court has overlooked its prior determinations that the possibility of obtaining a judgment against a condemnor is *not* sufficient security *per se* to safeguard the constitutional rights of a property owner that such a judg-

ment must be one whereunder the owner can "*certainly obtain* the amount of . . . compensation."

Sweet v. Rechel (1895), 159 U.S. 380; 40 L.Ed. 188, 197;

Williams v. Parker (1902), 188 U.S. 491; 47 L.Ed. 559;

Crozier v. Fried. Krupp. Aktiengesellschaft (1911), 224 U.S. 290; 56 L.Ed. 771, 776;

Hans v. Seattle (1920), 40 S.Ct. 125; 251 U.S. 233; 64 L.Ed. 243;

Joslin Mfg. Co. v. Providence (1922), 262 U.S. 668; 67 L.Ed. 1167;

Dohany v. Rogers (1930), 50 S.Ct. 269; 281 U.S. 362; 74 L.Ed. 904.

It is well settled that the right of an owner of condemned property to collect a judgment against *a private* condemnor is not an adequate provision for the payment of "just compensation" sufficient to dispense with requirement for deposit of security in advance of taking.

Nichols on Eminent Domain, Third Edition, Sec. 8.712.

Though this prohibition is not inflexibly applied to municipal condemnors, authority supports the conclusion that *the fact a condemnor is a municipal corporation is not in and of itself sufficient reason for dispensing with the requirement of the deposit of security in advance of a taking.* Thus the Supreme Court of New Hampshire observed in *Goodrich Falls Electric Co. v. Howard* (1934), 171 Atl. 761:

> "Taking before payment is valid if the unascertained payment is duly secured, but not otherwise. Hence the statute operates when the payment is thus secured, and not in cases where the security is insufficient. It applies to municipalities whose credit at the time of taking is

of such strength that security for payment is the equivalence of payment. It does not apply to them when they are deficient in such credit. *The circumstances of security are to be examined in each case in order to determine if they afford the owner the protection he is entitled to.*

"....

"... *The issue in each case is one of fact and degree and demands attention to other items of relevance besides the public character of the taker and its present solvency. They are not by themselves decisive.*" (Emphasis added.)

In *Lone Star Gas Co. v. City of Fort Worth*, (1936) 98 S.W. 2d 799, 804, the Texas court determined that a city could not condemn a gas distributing system because neither the general statutes of Texas nor the City Charter prescribed an appropriate method of procedure whereunder such property might be condemned. The general statutes contained a section which provided that after an award of compensation had been determined, the condemnor could take possession of the property sought by paying the amount of damages awarded or by depositing the same in court, and by further depositing (1) an amount equal to the award to be held pending ascertainment of additional damages, and (2) by filing a bond to secure payment of costs. The section exempted municipal corporations from doing more than paying the sum awarded in advance of possession regardless of whether or not such sum might represent adequate compensation. The court declared:

"Under this Article . . . the City of Fort Worth after paying the amount awarded by the Commissioners, whether great or small, could take possession of the gas system and business of plaintiff, alleged to be worth $20,000,000, and in the event it was ultimately

found that the cost to be paid plaintiff was in excess of the award of Commissioners, plaintiff would have no security therefor, and would have been deprived of its property in advance of compensation 'first made or secured by a deposit of money'. In addition, under this statute the City might take possession of the gas system, appropriate or otherwise use it for an indefinite time, and then return same with no security to plaintiff for payment of its damages by reason of depreciation, mismanagement, loss, forfeiture of leases, or otherwise, except the award made by the Commissioners, which might be wholly inadequate.

It is not necessary for us to hold that if a public utility's business and system be taken under these provisions, the constitutional safeguards would be violated, *although it appears very probably such would be true.*" (Emphasis added)

The provision of the Texas Constitution referred to in *Lone Star* decreed that property could not be taken except by the state unless, "compensation shall be first made, or secured by a deposit of money." *The requirement there for advance deposit is identical in effect with the rulings of this Court (see cases above, page 3) that security must precede a taking.* It is noteworthy that the Texas court felt that it was unconstitutional to relieve a municipal corporation from this requirement. It indicates an awareness that indulgence in the assumption that municipal credit is tantamount to a deposit of security is incorrect.

In this proceeding, by the sworn affidavit of the City's Manager Jack, the City has admitted that it was required to incur a bonded debt of two and a half million dollars before it could raise sufficient monies to pay the amount of "just compensation" fixed in the *original* Public Utilities Commission valuation proceedings. ("Statement as to Jurisdiction", pp. 8-9.) The City has conceded that it is looking

to the balance of its bond sale proceeds to pay any supplementary award of compensation. ("Motion to Dismiss or Affirm", p. 6.) While it would have this Court believe that those proceeds provide a sufficient fund from which to pay any such supplemental award, the City carefully avoided making such statement under oath to the lower court. Its counsel *argued* only that it had adequate funds to pay its own "estimate" thereof. Remarkably, the only basis for such estimate in evidence was a letter from the Staff of the California Public Utilities Commission which revealed that this so-called estimate was woefully inadequate. ("Appellant's Reply to Motion to Dismiss", p. 10.) In any event, the lower court refused to reconcile the dispute between the parties as to the amount of the supplemental award which might reasonably be anticipated.

We submit that under the circumstances of this case where (1) the Appellee has already admitted inability to pay even a portion of the total award of "just compensation" without the sale of bonds, and (2) where it has deliberately avoided verifying support for its *argument* that its bond proceeds will be sufficient to pay the complete award, a serious doubt is raised as to its financial standing and its ability to satisfy any judgment of "just compensation".

The City has attempted to belittle Appellant's objections by contending that if a deficit between its bond funds and the award occurs, it will exercise its tax powers to make up any deficiency. But a general law city, such as North Sacramento, does *not* have unlimited tax powers, as it would imply. (Government Code Section 43068.*) Nor can it be

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* "Unless a majority of the city electors voting at an election held for that purpose are in favor of it, *the annual property tax shall not exceed one dollar ($1) on each one hundred dollars ($100)*, exclusive of such tax as may be necessary to pay the costs of any pension plan for city employees adopted pursuant to Article 2, Chapter 2, of Division 5, exclusive of such tax, not to exceed five cents ($.05)

assumed that it can immediately make its tax power available for satisfaction of condemnation judgments to the exclusion of all its other prior existing municipal responsibilities.

We have heretofore called this Court's attention to the provisions of the California Government Code which authorize municipalities to stagger the payment of judgments over extended terms of as long as ten years. ("Statement as to Jurisdiction", pp. 15-16.) While the issue of the constitutionality of such sections as applied to the payment of a judgment arising in a condemnation proceeding appears not to have arisen heretofore, it is submitted that condemnation judgments cannot be subordinated, *either by option or direction*, to other judgment claims, nor treated merely on a parity with them. In invalidating a statute which effectually directed that condemnation judgments be so considered, the Illinois Supreme Court declared:

> "It must be remembered that a landowner whose property is taken or damaged for public use through the exercise of the power of eminent domain is an involuntary creditor who has no right to prevent the city from taking or damaging his property. To place him in the same class with a person who voluntarily became a creditor of the municipality, with knowledge of its financial condition, and then to deny him the right to payment until all prior judgment creditors had been paid or given a chance to be paid, is a denial of his right

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on each one hundred dollars ($100), as may be necessary to pay the costs of civil defense or disaster preparedness, exclusive of such tax as may be necessary to pay the costs of sewerage facilities, exclusive of such tax as may be necessary to pay the costs of park and recreation facilities and exclusive of such tax in addition to the annual tax levy for other municipal purposes authorized by Sections 20532 [contributions to State Retirement System], 37465 [Veterans Homes], 37558 [Museum Maintenance], and 43069 [Flood Control Works] of this code, Section 5304 of the Public Resources Code and Section 22241 of the Education Code." (Emphasis added.)

to just compensation. It is no answer to say that he is entitled to interest on his judgment until he is paid. His right to payment of the judgment itself cannot be thus circumscribed."

People ex rel Wanless v. Chicago (1941), 38 N.E.2d 743; 138 ALR 1298, 1303.

Appellant submits that the reasoning in *Wanless* demonstrates that the City of North Sacramento could not constitutionally invoke the staggered payment provisions referred to in order to pay the balance of a "just compensation" award herein, and that, of necessity, it must pay any judgment of "just compensation" promptly. However, the probability of the City's being able to promptly pay Appellant any balance due it, either through exercise of its tax power or from bond proceeds, is in light of the record herein, at the very least highly speculative.

For these reasons Appellant respectfully submits that this Court cannot properly indulge in any assumption that this condemning City is able to make prompt payment of any such judgment of compensation, and or that any such judgment entered against it will adequately safeguard the property rights of Appellant.

It is altogether proper and indeed necessary in order to protect an owner's rights that evidence be taken regarding the likelihood of prompt payment of compensation by a municipal condemnor.

(See *Dowdle v. Raney* (1941), 147 S.W. 2d 42.)

Appellant submits that in properly ruling on its Motion to Stay Execution, the Superior Court should have, first, determined *prima facie* the measure of additional just compensation likely to be awarded in the proceeding, and secondly, the probability that this municipal condemnor could pay the same. Its failure to do so should have been rectified

by the District Court of Appeal upon review following a granting of Appellant's Petition for Review and or Prohibition. Its order, here appealed, denying such petition indicates that it erroneously declined to correct the error of the lower court, and in doing so it also erred.

It is respectfully submitted that in view of the above this Honorable Court should grant this Petition for Rehearing and that following review it should order the Respondent District Court of Appeal to direct the Superior Court of Sacramento County to issue its appropriate orders requiring the City of North Sacramento to (a) return possession of Appellant's said water system to Appellant, (b) to render to Appellant an accounting of the profits derived by said City therefrom during the period it has been in possession thereof, and (c) requiring said City, in advance of reacquiring possession of such system, to post such security for the payment of the balance of "just compensation" as said lower court shall, after hearing, determine is reasonable.

Dated: November 29, 1962.

Respectfully submitted,

ALVIN H. PELAVIN
300 Montgomery Street
San Francisco 4, California

Counsel for Appellant.

In the Supreme Court of the United States

OCTOBER TERM 1962

No. 330

CITIZENS UTILITIES COMPANY OF CALIFORNIA, a corporation,

Appellant,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO, AND CITY OF NORTH SACRAMENTO; a municipal corporation (Real Party in Interest),

Appellees.

Appeal from the Judgment of the District Court of Appeal, State of California, in and for the Third Appellate District.

CERTIFICATE OF COUNSEL

The undersigned, counsel for Appellant herein, does hereby certify that the Petition for Rehearing attached hereto is presented in good faith and not for the purpose of delay.

Dated this 29th day of November, 1962.

ALVIN H. PELAVIN
Counsel for Appellant

CERTIFICATE OF SERVICE

I, ALVIN H. PELAVIN, counsel for Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of November, 1962, I served copies of APPELLANT'S PETITION FOR REHEARING on the several parties thereto, as follows:

1. On the Superior Court of the State of California in and for the County of Sacramento, by mailing a copy thereof in a duly addressed and sealed envelope with postage prepaid thereon to C. C. La Rue, County Clerk of the County of Sacramento, Court House, Sacramento, California.

2. On the City of North Sacramento, real party in interest herein, by mailing a copy thereof to Raymond McClure, Esq., 500 Calvados Avenue, North Sacramento, California, and another copy thereof to Martin McDonough, Esq., 926 J Building, Sacramento 14, California, each in a duly addressed and sealed envelope with postage prepaid thereon.

Dated November 29, 1962.

ALVIN H. PELAVIN
300 Montgomery Street
San Francisco 4, California
Attorney for Appellant